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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MUNIR UWAYDAH, et al.,

Plaintiffs and Appellants,

v.

BRUCE M. ROTH, et al.,

Defendants and Respondents.

B217606

(Los Angeles County

Super. Ct. No. BC406915)

APPEAL from an order of the Superior Court of Los Angeles County.

Joanne O'Donnell, Judge. Affirmed.

Kneafsey, Tostado & Associates, Sean M. Kneafsey, Michele Friend and
Shaun Swiger; Kneafsey & Friend for Plaintiffs and Appellants.

Brown White & Newhouse, Thomas M. Brown, Kenneth P. White, Sydney
M. Mehringer and George Schiavelli for Defendants and Respondents.

SUMMARY

This is an appeal from an order granting the defendant's special motion to strike. We affirm.

FACTUAL AND PROCEDURAL SYNOPSIS

According to the complaint, Munir Uwaydah, M.D., is a Board-certified orthopedic surgeon who evaluates and treats patients at numerous medical offices and hospitals throughout Los Angeles County. Uwaydah is the majority owner of Frontline Medical Associates, the entity through which he operates his medical practice.

Bruce Roth is an employee, agent or representative of State Compensation Insurance Fund (State Fund).¹

As of early 2006, numerous medication reimbursement claims Uwaydah and Frontline had submitted to State Fund remained unpaid. The outstanding pharmacy claims totaled about \$2 million. On Uwaydah's behalf, attorney Mark Weiss attempted to negotiate a bulk settlement of these claims relating to State Fund's insureds, and Weiss's contact at State Fund was Roth. Roth said he would be able to facilitate a settlement. At Roth's direction, Weiss resubmitted the claims individually, but Weiss's numerous letters and phone calls to Roth went unanswered, and the settlement offer was withdrawn.

¹ As discussed in *Notrica v. State Comp. Ins. Fund* (1999) 70 Cal.App.4th 911 (*Notrica*) (as well as Roth's subsequently filed declaration), State Fund is an entity created by the California Legislature as a self-supporting, nonprofit enterprise providing worker's compensation insurance to California employers at cost, in competition with private compensation insurers and with no financial obligation to the public. (See also Ins. Code, §§ 11770, 11775.)

Citing *Notrica, supra*, 70 Cal.App.4th at pages 935 and 941, and Insurance Code section 11873, subdivision (a), Uwaydah alleged State Fund is not a state agency and is not entitled to the immunities applicable to a governmental agency.

At various times during 2007, third parties told Uwaydah they had heard he was under some kind of investigation, but Uwaydah could not identify the source of these rumors. Then, he happened to run into Shannon Moore, a former employee, who said she was contacted on December 14, 2007, by an investigator (Greg Frost of Martin Frost Investigations) Roth had retained on behalf of State Fund to investigate Uwaydah. Frost told Moore he needed information from her about Uwaydah's business practices because he was investigating the pharmacy reimbursement claims. It had been three years since Moore had worked for Uwaydah. Frost did not say how he obtained her number and did not subpoena her but wanted her to give a statement on January 4, 2008. She told him she was not interested in doing so.

Later Uwaydah spoke with others who had heard additional disturbing accounts that he was under investigation, and he is informed and believed these accounts arose from Roth contacting hospitals, health care entities and third parties and making negative statements and inquiries about him.

After speaking with Moore, Weiss made multiple attempts to contact Roth but never reached him or received a return call. On December 20, 2007, Weiss sent Roth a letter about Frost's investigation, welcoming Roth's direct inquiries regarding Uwaydah if there was a legitimate reason. If not, Weiss demanded Roth stop contacting third parties about Uwaydah. Weiss received no reply.

Uwaydah heard nothing more from Roth until January 7, 2009, when, by chance, he learned Roth had sent two subpoenas, dated September 5, 2008 (attached as exhibits to the complaint), to Jindy Bal, counsel for Tustin Hospital (one of the locations where Uwaydah practices). Through the subpoenas, Roth sought confidential medical records of two of Uwaydah's patients (Santos Hernandez and Jesse Florez, Jr.) as well as

Uwaydah's peer review records, which are privileged under Evidence Code section 1157.²

In correspondence to Bal dated December 30, 2008 (another exhibit to the complaint), in support of his request for "peer review or any disciplinary records dealing with staff privileges" for Uwaydah in 2004-2005, "Roth assert[ed] State Fund is a 'state agency,' pursuant to Insurance Code [section] 56, 'with the authority to request records dealing with any physician doing business in California worker's compensation relevant to abusive billing and treatment practices.'" According to Uwaydah's complaint, "That was a lie."

On January 8, 2009, one of Uwaydah's attorneys (Benjamin Fenton) sent correspondence to Bal (also an exhibit) objecting to the subpoenas and to Tustin Hospital's release of any of the requested documents. Fenton provided statutory and case law supporting the objections and advising as follows:

"(a) As stated above, although State Fund is a public entity, it is not deemed a state agency, nor is it afforded the immunities normally applied to governmental agencies.

² Both subpoenas reference an Exhibit A for a description of the records sought. The only Exhibit A attached to the complaint identifies Florez's case and specifies "[a]ny and all medical records including but not limited to peer review records, disciplinary reports or evaluations on the surgical/medical practices of Munir Uwaydah, M.D. and the identity of [the] custodian of records for Tustin Hospital and employees assisting Dr. Uwaydah during surgeries from 07/13/05 to 02/10/06 for the above referenced State Fund Claimant."

The declaration (bearing Roth's name and apparent signature) in support of the subpoena for Florez's records states: "Dr. Munir Uwaydah performed surgery on the above named injured worker, a State Fund claimant at Tustin Hospital on 09/28/05, 10/12/05 & 10/17/2005. The California Medical Board has filed an Accusation against Dr. Uwaydah for having a P.A. do many procedures during surgeries at Tustin and disciplinary or hospital records for Tustin are material to show State Fund may not have any liability for Dr. Uwaydah's surgical expenses." (The declaration accompanying the subpoena for Hernandez's records does not include this additional information, no attorney is identified and the form is unsigned.)

Thus, [Roth does] not have the authority [he] assert[s] to seek confidential records and documents strictly protected from discovery by Evidence Code [section] 1157 (in fact, Insurance Code [section] 56, cited as authority by Roth, does not even exist); and,

“(b) Dr. Uwaydah was never given notice from either State Fund or Tustin Hospital that the [s]ubpoenas were served.”

In addition, the subpoenas referenced two different matters with the same case number: one in which Roth was never the attorney of record and another in which it is unclear whether Roth was ever attorney of record, the wrong employer/defendant was listed and the case had been closed for over a year.

On January 15, 2009, Roth sent a letter and subpoena to Bal (attached to the complaint) in “another misplaced effort” to obtain the privileged records of Uwaydah and his patient Santos Hernandez.³ Uwaydah is informed and believes Roth continues to contact hospitals and other third parties “fishing” for information to deny Uwaydah’s claims. Roth is seeking privileged information about Uwaydah and his practice and is willing to provide phony documentation under the guise of government authority to do so.

³ This time the subpoena referenced an attachment identifying Hernandez’s worker’s compensation case and specified the following documents: “Any and all medical records including but not limited to peer review records, disciplinary reports or evaluation on the surgical/medical practices of Munir Uwaydah, M.D. and the identity of [the] custodian of records for Tustin Hospital and employees assisting Dr. Uwaydah during surgeries from 3/22/05 to July 16, 2005, for the above referenced State Fund claimant.”

Also, the supporting declaration (bearing Roth’s name and apparent signature) states “[t]hat said documents are material to the issues involved in the case for the following reasons: Dr. Munir Uwaydah performed surgery on the above named injured worker, a State Fund claimant at Tustin Hospital on 03/22/05. The California Medical Board has file[d] an Accusation against Dr. Uwayda[h] for having a P.A. do many procedures during surgeries at Tustin and disciplinary or hospital records for Tustin are material to show State Fund may not have any liability for Dr. Uwaydah’s surgical expenses.”

Roth is conducting an informal and unofficial investigation into Uwaydah's practices while representing to others Uwaydah is being officially investigated by a public entity. In issuing the subpoenas to Bal, Roth misused the subpoena process by: (1) seeking confidential and protected records pertaining to Uwaydah and his patients, (2) purporting to have the authority to obtain such records due to "state agency" status, (3) failing to provide Uwaydah with notice the subpoenas were served, and (4) failing to execute the Declaration of Service page. Roth's ulterior motive was to obtain a collateral advantage over Uwaydah by means of extortion. In order to gain leverage in settlement negotiations, Roth sought to defame Uwaydah. Roth acted from an improper, evil, malicious motive in that he used the legal process to defame Uwaydah, entitling him to punitive damages.

On the basis of these allegations, Uwaydah (and Frontline, included in our further references to Uwaydah) sued Roth for abuse of process.⁴

Roth filed a special motion to strike pursuant to Code of Civil Procedure section 425.16. Roth argued his conduct was protected as the complaint was based solely upon his conduct and communications in the course of an authorized investigation into Uwaydah's potential insurance fraud, and in connection with reports to the Department of Insurance and ongoing proceedings before the Worker's Compensation Appeals Board (WCAB). Further, he said, Uwaydah could not establish a probability of prevailing on his claims because: (1) As a public employee, Roth is immune from liability pursuant to section 821.6 of the Government Code; (2) Roth's conduct is protected by the litigation privilege of Civil Code section 47, subdivision (b), because his conduct is an

⁴ In addition to the abuse of process claim (the third cause of action), Uwaydah and Frontline asserted seven more causes of action against Roth: slander per se, libel per se, negligent interference with prospective economic advantage, intentional interference with prospective economic advantage, negligent interference with contractual relations, intentional interference with contractual relations and injunctive relief. However, he has abandoned all causes of action other than his abuse of process claim on appeal.

investigation of insurance fraud in preparation for a statutorily mandated report to the Department of Insurance; and (3) his conduct is protected by the litigation privilege (Civ. Code, § 47, subd. (b)), because he made his statements in connection with judicial proceedings before the WCAB.

In his supporting declaration, Roth said the State of California has employed him as an attorney from 1990 to the present. His salary is paid from the State's general fund, he is a member of the Association of California State Attorneys, his continuing legal education requirements are waived, he earns state employee retirement benefits and he has the right to laterally transfer to another State agency while retaining his civil service rank which is Staff Specialist III.

While the State of California employs and pays him, Roth stated, he is currently assigned to work as an attorney for State Fund. He has worked in State Fund's Special Litigation Unit (SLU) since 1992. One of his principal job responsibilities is to investigate worker's compensation insurance fraud on behalf of State Fund. In 2007 and 2008, as part of his duties as an SLU attorney and at his supervisor's direction, he participated in an SLU investigation of claims submitted to State Fund and liens submitted to the WCAB by Uwaydah in which Uwaydah asserted he had provided medical services to worker's compensation applicants.

According to Roth's declaration, the investigation focused on questions of potential worker's compensation and insurance fraud including: (1) whether Uwaydah had billed for prescriptions and services patients did not need; (2) whether Uwaydah had billed for prescriptions never ordered; (3) whether Uwaydah had billed for services purportedly performed by physicians that were actually performed by physicians' assistants; and (4) whether Uwaydah had sold previously paid patient accounts to third-party billers under the guise that the bills had not been paid in a scheme to defraud State Fund into paying the same bill twice. "The investigation of [Uwaydah] is, in my estimation, one of the most significant and substantial investigations State Fund is conducting in the entire state."

Roth further testified the investigation was not “unofficial” or “informal” but rather conducted as part of Roth’s role as an SLU attorney to advance the statutory mandate of the State Fund, and with the full knowledge and direction of supervisors at SLU, using the same methods SLU attorneys routinely use. The purposes included (1) determining whether liens Uwaydah placed in WCAB cases were fraudulent and preparing to attack those liens and convince the WCAB to reject the asserted charges, and (2) determining whether there was cause to make a fraud referral to the Department of Insurance, and once that referral was made, determining how it should be supplemented. According to Roth’s declaration, in the course of his investigation, he spoke with third parties including representatives of hospitals and other health care providers. While Uwaydah misrepresents some of the content—for example, Roth said, he made no “negative statements” about Uwaydah, the communications complained of were communications in the course of this investigation.

With respect to the two subpoenas for records relating to Florez and Hernandez, Roth said, State Fund is the insurer in both matters and is, therefore, a party to both matters holding all discovery rights of any party in these matters, including issuance of subpoenas for records. He issued the subpoenas identified in the complaint because Uwaydah submitted medical liens in both cases based upon medical services allegedly provided to these workers. (Roth attached copies of lien documents in these cases to his declaration.) Through these subpoenas, Roth stated, he was investigating claims Uwaydah had been letting physician assistants conduct surgeries and billing as if a surgeon had performed them and whether such fraudulent conduct may have formed the basis for liens filed with the WCAB. He hoped to use the information to cause the WCAB to question these specific liens as well as all liens Uwaydah submitted. Both cases remained open at the time Roth issued the subpoenas. Moreover, in WCAB cases, insurers like State Fund can challenge liens even after a worker’s compensation claim is resolved.

Finally, Roth said, in his letter to an attorney for a subpoenaed hospital, he had cited Insurance Code section 56 as authority establishing State Fund as a state agency in error; the correct citation is *Labor* Code section 56.

In his declaration in support of his opposition, Uwaydah acknowledged, “A formal accusation was filed against me by the Medical Board of California on May 30, 2007. This Accusation is still pending.”

After hearing Uwaydah’s argument (that the burden of proof never shifted to him as Roth had failed to demonstrate the communications identified in the complaint were in connection with any official proceeding or matter of public interest), the trial court stood by its tentative ruling and granted Roth’s motion. In its order, the court stated that Roth’s evidence demonstrated that he undertook the investigation and engaged in the conduct and communications described in the complaint for the purpose of investigating worker’s compensation insurance fraud on behalf of State Fund in order to report it to the Department of Insurance and in order to use the information in a proceeding before the Worker’s Compensation Appeals Board. Further, an investigation into insurance fraud is an issue of public interest. In addition, the trial court determined, Uwaydah had failed to meet his burden of demonstrating a probability of prevailing on his claims as the communications and conduct of which Uwaydah complained took place in the course of investigations into Uwaydah’s billing practices relevant to fraudulent billing and treatment practices and were part of an investigation that was preparatory to the institution of an official or judicial proceeding by the Department of Insurance. As such, Roth’s conduct and communications were privileged under Civil Code section 47.

Uwaydah appeals.

DISCUSSION

According to Uwaydah, the trial court erred in granting Roth’s motion to strike because Uwaydah’s abuse of process claim is based on Roth’s “unlawful conduct . . . that does not constitute a communication protected by the litigation privilege. Namely,

[Roth] issued and attempted to enforce improper subpoenas in two separate compromised and released cases in which (1) he was not an attorney of record; (2) he sought confidential, privileged records of [Uwaydah] from third parties that were unrelated to the underlying cases; and (3) he failed to provide notice to [Uwaydah] that these sensitive records were being subpoenaed.” We disagree.

Section 425.16 of the Code of Civil Procedure provides, “A cause of action against a person arising from any act of that person in furtherance of the person’s right of petition or free speech under the United States or California Constitution in connection with a public issue shall be subject to a special motion to strike, unless the court determines that the plaintiff has established that there is a probability that the plaintiff will prevail on the claim.”⁵ (Code Civ. Proc., § 425.16, subd. (b)(1) [further undesignated statutory references are to the Code of Civil Procedure].) In ruling on a defendant’s motion under section 425.16, the trial court engages in a two-step process.

“First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. The moving defendant’s burden is to demonstrate that the act or acts of which the plaintiff complains were taken ‘in furtherance of the [defendant]’s right of petition or free speech under the United States or California Constitution in connection with a public issue,’ as defined in

⁵ Under the statute an “‘act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue’ includes: (1) any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law; (2) *any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law*; (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest; (4) *or any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.*” (§ 425.16, subd. (e), italics added.)

the statute.^[6] (§ 425.16, subd. (b)(1).) If the court finds such a showing has been made, it then determines whether the plaintiff has demonstrated a probability of prevailing on the claim.^[7] Under section 425.16, subdivision (b)(2), the trial court in making these determinations considers ‘the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based.’” (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67 (*Equilon*).) “‘The defendant has the burden on the first issue, the threshold issue; the plaintiff has the burden on the second issue.’ . . .” (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 928, citation omitted.)

We review the trial court’s ruling on an anti-SLAPP motion independently under a de novo standard of review. (*Flatley v. Mauro* (2006) 39 Cal.4th 299, 325 (*Flatley*); *Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1055 (*Rusheen*).)

According to Uwaydah, the trial court erred in concluding Roth had met his threshold burden in demonstrating the challenged causes of action arose from protected

⁶ As to this threshold issue, the moving party’s burden is to show “the challenged cause of action arises from protected activity.” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056.) “[T]he statutory phrase ‘cause of action . . . arising from’ means simply that the defendant’s act underlying the plaintiff’s cause of action must *itself* have been an act in furtherance of the right of petition or free speech. [Citation.] In the anti-SLAPP context, the critical point is whether the plaintiff’s cause of action itself was *based on* an act in furtherance of the defendant’s right of petition or free speech. [Citations.] ‘A defendant meets this burden by demonstrating that the act underlying the plaintiff’s cause [of action] fits one of the categories spelled out in section 425.16, subdivision (e)’” (*City of Los Angeles v. Animal Defense League* (2006) 135 Cal.App.4th 606, 616, fn. 10, original italics, quoting *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)

⁷ In order to establish a probability of prevailing on the claim, a plaintiff responding to a motion pursuant to section 425.16 must state and substantiate a legally sufficient claim; “[p]ut another way, the plaintiff ‘must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited.’ [Citations.]” (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1056, citations omitted.)

activity. We disagree.

To satisfy the initial burden on a special motion to strike, the defendant must demonstrate the conduct that forms the basis for the challenged causes of action was an act in furtherance of the right of petition or free speech. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78; *Equilon, supra*, 29 Cal.4th at p. 67.) As we stated in *Fox Searchlight Pictures, Inc. v. Paladino* (2001) 89 Cal.App.4th 294, 305, “The Legislature did not intend that in order to invoke the special motion to strike the defendant must first establish her actions are constitutionally protected under the First Amendment as a matter of law. If this were the case then the inquiry as to whether the plaintiff has established a probability of success would be superfluous.” Only in the “narrow circumstance” in which the “defendant concedes, or the evidence conclusively establishes,” that the defendant’s assertedly protected conduct was illegal as a matter of law is the defendant precluded from using section 425.16 to strike the plaintiff’s action. (*Flatley, supra*, 39 Cal.4th at pp. 316, 320; see *Governor Gray Davis Com. v. American Taxpayers Alliance* (2002) 102 Cal.App.4th 449, 460, citation omitted [Where “the legality of [the defendant’s] exercise of a constitutionally protected right [is] in dispute in the action, the threshold element in a section 425.16 inquiry has been established”].)

As our Supreme Court noted in *Flatley*, “any ‘claimed illegitimacy of the defendant’s acts is an issue which the plaintiff must raise *and* support in the context of the discharge of the plaintiff’s [secondary] burden to provide a prima facie showing of the merits of the plaintiff’s case.’” (*Flatley, supra*, 39 Cal.4th at p. 319, original italics, citations omitted.) “[W]e emphasize that the question of whether the defendant’s underlying conduct was illegal as a matter of law is preliminary, and unrelated to the second prong question of whether the plaintiff has demonstrated a probability of prevailing, and the showing required to establish conduct illegal as a matter of law--either through defendant’s concession or by uncontroverted and conclusive evidence--is not the same showing as the plaintiff’s secondary prong showing of probability of prevailing.” (*Id.* at p. 320.)

The record establishes that Roth met his threshold showing that Uwaydah's abuse of process claim arises out of protected activity within the meaning of subdivisions (e)(2) ["any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law"] and (e)(4) ["any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest"] of section 425.16 as Roth argues. (See also *Dove Audio, Inc. v. Rosenfeld, Meyer & Susman* (1996) 47 Cal.App.4th 777, 783-784; *Fremont Comp. Ins. Co. v. Superior Court* (1996) 44 Cal.App.4th 867, 875; Ins. Code, § 1877.3, subd. (b)(1).)

Turning to the question of Uwaydah's probability of prevailing on his claim for abuse of process, even leaving to one side the evidence and authority in support of Roth's claim of immunity under the Government Code, the litigation privilege defeats Uwaydah's claim. (Civ. Code, § 47, subd. (b).)

"The usual formulation is that the privilege applies to any communication (1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action. [Citations.]" (*Silberg v. Anderson* (1990) 50 Cal.3d 205, 212 (*Silberg*)). The requirement that the statement be made "in" a judicial proceeding does not limit the litigation privilege to statements made at trial or to evidence offered in open court. (*Rusheen, supra*, 37 Cal.4th at p. 1057.) Rather, the privilege "applies to any publication required or permitted by law in the course of a judicial proceeding to achieve the objects of the litigation, even though the publication is made outside the courtroom and no function of the court or its officers is involved." (*Silberg, supra*, 50 Cal.3d at p. 212.) As a result, "'communications with 'some relation' to judicial proceedings' are 'absolutely immune from tort liability' by the litigation privilege." (*Rusheen, supra*, 37 Cal.4th at p. 1057, citations omitted.)

Uwaydah's efforts to distinguish the authorities defeating his claim are unavailing

as his claim that the litigation privilege is inapplicable on this record is meritless. (*Dove Audio, Inc. v. Rosenfeld, Meyer & Susman, supra*, 47 Cal.App.4th at pp. 783-784.)

Uwaydah has failed to meet his burden to demonstrate a probability of prevailing on his abuse of process claim, and Roth's motion was properly granted.

DISPOSITION

The order is affirmed. Roth is entitled to his attorney fees and costs pursuant to section 425.16.

WOODS, J.

We concur:

PERLUSS, P. J.

JACKSON, J.